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No. 91-754

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

HOME BOX OFFICE, INC., *et al.*,
Petitioners,

v.

Z CHANNEL LIMITED PARTNERSHIP,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF OF PETITIONERS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Petitioners respectfully submit this reply memorandum in support of their petition for a writ of certiorari.

INTRODUCTION

Z Channel's opposition highlights the fundamentally flawed premise of the Ninth Circuit's ruling that mootness is determined by what a plaintiff might have been entitled to seek below, rather than what a plaintiff actually sought. Such a rule has no support in this Court's jurisprudence, threatens to expand appellate jurisdiction, and creates a circuit split that cannot be distinguished away.

I

AN OTHERWISE MOOT CASE CANNOT BE REVIVED BY LOOKING TO RELIEF THAT THE PLAINTIFF MIGHT HAVE, BUT DID NOT, SEEK

This case is moot because the relief sought by Z Channel can no longer be granted. In every case cited by either petitioners or Z Channel, the issue of mootness was resolved by looking to the pleadings. Prior to the Ninth Circuit's decision below, no court permitted a plaintiff to rescue a moot claim for declaratory and injunctive relief by raising a damage claim for the first time on appeal. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957), and *Powell v. McCormack*, 395 U.S. 486 (1969), were not moot because the plaintiff asked for money damages. *DeFunis v. Odegaard*, 416 U.S. 312 (1974), and *Alejandrino v. Quezon*, 271 U.S. 528 (1926), were moot because the plaintiff did not ask for money damages.

According to Z Channel, *Alejandrino* was dismissed for mootness:

> "because the pleadings were such that it could *not* be determined *whether* any such right existed. In short, the Supreme Court could not grant mandamus because it had no basis for knowing from the pleadings whether or not there was an entitlement to a money judgment."

Respondent's Brief at 14 (emphasis in original). Z Channel's brief simply misreads *Alejandrino*. This Court looked to what the plaintiff asked for, not what the plaintiff *could* have successfully asked for. *See Alejandrino*, 271 U.S. at 535. Z Channel's interpretation would require a court to look at the *merits* of a case before resolving the issue of mootness. Such a rule turns moot-

ness on its head, is burdensome for courts, and is unfair to defendants.

Mootness rests upon pleadings, not conjecture. As Judge Kozinski's dissent observed, Federal Rule of Civil Procedure 8(a)(3) requires that a complaint specify the relief the pleader seeks.[1] Z Channel argues that Federal Rule of Civil Procedure 54(c) and the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02, somehow erase Rule 8(a)(3). This argument overreaches. Rule 54(c) and 28 U.S.C. § 2202 permit an award of additional relief *ancillary to the relief sought* in the complaint. But a party must first secure the relief sought before becoming eligible for the ancillary relief. Mootness of the relief sought moots the entire case.

For example, had Z Channel been awarded a declaratory judgment, it might also have received damages. That is because the Declaratory Judgment Act provides that further "necessary or proper relief *based on a declaratory judgment or decree* may be granted***." 28 U.S.C. § 2202 (emphasis added). This provision is in accord with the "general rule that courts have the power to administer the supplemental relief to give effect to their judgments or decrees, and the declaratory judgment is no exception." 6A J. Moore, *Moore's Federal Practice* ¶ 57.10 at 57-78 (2d ed. 1991) (citing *Terry v. Adams*, 345 U.S. 461 (1953)). But in this case, it is undisputed that mootness precludes any declaratory judgment. Therefore, no award of mone-

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[1]Z Channel cites *Conley v. Gibson*, 355 U.S. 41 (1957) — which had nothing to do with mootness or Rule 8(a)(3) — to suggest that adherence to "the modest requirement" of Rule 8(a)(3) would transform pleading into a game of skill. But it is only by reference to the pleadings, not speculation or second-guessing, that a court can determine whether the case before it is moot. Z Channel's rule would turn jurisdiction into a game requiring appellate courts to second-guess what claims the plaintiff could have alleged.

tary damages to "give effect" to a declaratory judgment is possible.[2]

II

THE OPINION BELOW CREATES A CIRCUIT SPLIT

The Ninth Circuit's opinion is at odds with the law in the First, Fifth, Sixth, Seventh, and Eleventh Circuits. Z Channel attempts to distinguish cases from the Fifth and Seventh Circuits, but is unable to do so. In *H.K. Porter Co. v. Metropolitan Dade County*, 650 F.2d 778 (5th Cir. 1981), the plaintiff *could* have saved the case from mootness by adding a claim for damages. But, because the plaintiff did *not* do so, the appeal was dismissed as moot. Z Channel claims that it, unlike the plaintiff in *H.K Porter*, could not have amended its complaint to add damages. And yet, Z Channel amended its complaint *twice*, never adding a damages claim to Count One.[3]

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[2]Z Channel's argument that it sought damages below is, as Judge Kozinski's dissent demonstrated, bereft of merit. *See* dissent at 21a & n. 1. Even the Ninth Circuit majority opinion did not conclude that Z Channel had sought damages below. Rather, the Ninth Circuit stated that "Z Channel *now* seeks damages, and Count One of its Complaint, construed favorably to it, alleges restraints that *could* have resulted in financial damage to Z Channel." Majority opinion at 11a (emphasis added). Further, a boilerplate claim for "such other relief that the Court may deem just and proper" is not equivalent to a claim for damages. *See Sanchez-Mariani v. Ellingwood*, 691 F. 2d, 592, 596 (1st Cir. 1982) (claim for "such damages as may be just and proper under the circumstances of this case" did not constitute a damage claim that could save complaint from mootness).

[3]Z Channel's inability to add a damages claim after it appealed entry of summary judgment is not a reason to rewrite mootness law and permit courts to speculate as to what a plaintiff could have sought. After a certain point, and certainly after judgment below, a party is stuck with its pleadings.

Similarly, the plaintiff in *James Luterbach Const. Co. v. Adamkus*, 781 F.2d 599 (7th Cir. 1986), *could* have sought damages, but did not do so. The mootness of the declaratory relief sought by that plaintiff mooted the entire action. Z Channel attempts to distinguish *James Luterbach* on the ground that the plaintiff there stated in its complaint that it had "no adequate remedy at law other than a declaratory judgment." 781 F.2d at 602. But under the rule of speculation advocated by Z Channel and implemented by the Ninth Circuit, the court in *James Luterbach* would have disregarded the pleadings and focused on the remedies that the plaintiff *could* have sought. There is no doubt that, as both the Seventh Circuit and the plaintiff itself concluded, the *James Luterbach* plaintiff *could* have sought damages. But the Seventh Circuit declined to permit such speculative amendment of pleadings on appeal.

Interestingly, Z Channel ignores *Sanchez-Mariani v. Ellingwood*, 691 F.2d 592 (1st Cir. 1982), where the First Circuit also reached a result diametrically opposed to the Ninth Circuit's. One could conveivably have read the complaint in *Sanchez-Mariani* to supply the basis for a damages claim. But for the First Circuit, it was enough that the plaintiff did not seek such damages; the action brought was moot.

In short, Z Channel's efforts to explain away the circuit split fails. Z Channel argues that "in the cases cited by petitioners, the plaintiff was either a disappointed bidder, a graduated student, or a subpoenaed prisoner who could no longer show an entitlement to *any* form of relief that could have been appropriately granted upon remand." Brief of Respondent at 17 (emphasis in original). But the proper test is whether the plaintiff *sought* damages below for the claim on appeal, not whether the plaintiff "could

show an entitlement." The Ninth Circuit's decision applies the wrong test, departs from this Court's teaching, creates a circuit conflict, and is bad law.

CONCLUSION

For the foregoing reasons, petitioners respectfully ask that this Court grant the writ of certiorari, vacate the opinion of the United States Court of Appeals for the Ninth Circuit, and remand for dismissal of the case.

Respectively submitted,

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